Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Pegasus Development Corporation	)	
	)	File No. SES-LIC-20011121-02186
Consolidated Applications for Authority to	)	File No. SES-LIC-20020111-00075
Operate one U.S. Transmit/Receive Fixed Earth	)	
Station (Call Sign E010320) and 1,000,000	)	
Receive-Only Earth Stations (Call Sign E020022)	)	
with the Canadian-Licensed Nimiq 1 and Nimiq 2	)	
Satellites to Offer Direct Broadcast Satellite	)	
Service Throughout the United States.		

Order

Adopted: March 31, 2004 **Released: March 31, 2004**

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we authorize Pegasus Development Corporation ("Pegasus") to provide Direct Broadcast Satellite ("DBS") service in the United States using two Canadian DBS satellites.[1] Specifically, we authorize Pegasus to operate a network consisting of one hub earth station and one million satellite home terminals that will access the Canadian Nimiq 1 and Nimiq 2 DBS satellites. This decision, as well as our decision to grant a similar application filed by Digital Broadband Applications Corp. ("DBAC"),[2] should stimulate competition in the U.S. DBS market, providing consumers more alternatives in choosing subscription video providers and services. Increased competition may also lead to reduced prices for those services and further technological innovation.

[1] *See* WSNet Holdings, Inc., Application for a Fixed Transmit/Receive Earth Station, File No. SES-LIC-20011121-02186 and Call Sign E010320 (Nov. 21, 2001), and Amendments, File No. SES-AMD-20020102-00029 (Jan. 2, 2002), and File No. SES-AMD-20030917-01295 (Sept. 4, 2003) (notifying the Commission that Pegasus had acquired ownership of the underlying WSNet application); Application for Receive Only Earth Stations, File No. SES-LIC-20020111-00075 and Call Sign E020022, and One Request for Waiver, File No. SES-MSC-2002011100074 (Jan. 11, 2002) and Amendment, File No. SES-AMD-20030917-01296 (Sept. 4, 2003) (notifying the Commission that Pegasus had acquired ownership of the underlying WSNet application) (collectively, "WSNet Applications").

[2] *See* Digital Broadband Applications Corp. Consolidated Application for Authority to Operate U.S. Earth Stations with a U.S.-Licensed Ku-Band FSS Satellite and Canadian-Licensed Nimiq and Nimiq 2 Satellites to Offer Integrated Two-Way Broadband Video and Data Service Throughout the United States (Call Sign E020010), *Order*, 18 FCC Rcd 9455 (2003) ("*DBAC Order*"). DBAC proposed to use the Nimiq 1 and Nimiq 2 satellites, together with the U.S. Galaxy XI satellite, to provide a two-way broadband data and video service in the United States.

II. BACKGROUND

A. DISCO II Framework

2. The Commission's *DISCO II Order* adopted a framework under which the Commission would consider requests for non-U.S. licensed satellite systems to serve the United States.[3] To implement this framework, the Commission, among other things, established a procedure by which a service provider in the United States could request immediate access to a foreign in-orbit satellite that would serve the U.S. market.[4] This procedure requires the service provider to apply for an earth station license that would list the foreign satellite as an authorized point of communication.

3. Because the Commission does not issue duplicative U.S. licenses for space stations licensed by another administration,[5] a U.S. earth station application often represents the Commission's first opportunity to evaluate whether the foreign space station complies with the Commission's technical, legal, and financial qualification requirements. The first earth station application seeking to communicate with a particular foreign satellite must therefore include the same detailed information about the space station and its operations that the Commission requires from U.S. space station applicants.[6]

B. The WSNet Applications

4. Between November 2001 and January 2002, WSNet Holdings, Inc.[7] filed applications requesting authority to operate a very small aperture terminal ("VSAT") network that would provide DBS

[3] *See* Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States, *Report and Order*, IB Docket No. 96-111, 12 FCC Rcd 24094 (1997) ("*DISCO II"* or "*DISCO II Order"*).

[4] *See DISCO II*, 12 FCC Rcd at 24174 (para. 186). For a more detailed summary of the *DISCO II* framework, *see* Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, First Order on Reconsideration,* IB Docket No. 96-111, 15 FCC Rcd 7207, 7209-10 (paras. 4-5) (1999) ("*DISCO II First Reconsideration Order*").

[5] *DISCO II*, 12 FCC Rcd at 24174 (para. 188).

[6] All earth station applications must include an exhibit containing the information required by Section 25.114 of the Commission's rules, 47 C.F.R. § 25.114, with respect to the proposed non-U.S. satellite. *DISCO II*, 12 FCC Rcd at 24175 (para. 189); 47 C.F.R. § 25.137(b). Section 25.137(b) refers to Section 25.114, which sets forth information requirements for U.S. space station operators. Originally, financial information was not required if the satellite was already launched, and technical information was not required if the satellite had completed international coordination with the United States. *See DISCO II*, 12 FCC Rcd at 24175-76 (para. 191). However, in the *First Space Station Reform Order*, the Commission revised these requirements. First, the Commission now requires the submission of all the technical information in Section 25.114, regardless of whether the non-U.S.-licensed satellite has completed international coordination. Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 10760, 10871-73 (paras. 298-302) (2003) ("*First Space Station Reform Order*"). Second, the Commission has eliminated the financial qualification requirement for non-U.S.-licensed satellite operators, and has replaced it with a bond requirement. *First Space Station Reform Order*, 18 FCC Rcd at 10874-75 paras. 306-09). Later, in the *Third Space Station Reform Order*, the Commission explained that the revised information requirements apply to DBS applications as well as other satellite applications. Amendment of the Commission's Space Station Licensing Rules and Policies, *Third Report and Order*, IB Docket No. 02-34, 18 FCC Rcd 13486, 13492-93 (paras. 13-16) (2003) ("*Third Space Station Reform Order*").

[7] WSNet is a United States-owned company most recently engaged in the provision of digital and analog satellite television programming to franchise and private cable systems (including multi-dwelling unit buildings). *See* WSNet Application, Form 312 and Exhibit 2 at 3 and <http://www.wsnet.tv/About_Us/aboutwsnet.asp>. However, WSNet filed for voluntary Chapter 11 bankruptcy on October 21, 2002. *See* Letter from James U. Troup and Adrian B. Copiz, Counsel for WSNet Holdings, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, November 15, 2002.

service to customers in the United States, including those in rural and underserved markets.[8] On September 4, 2003, Pegasus filed amendment applications indicating that it had acquired various WSNet assets, including the WSNet Applications.[9] Pegasus indicated that "it does not seek to change any of the technical parameters" proposed in the WSNet Applications.[10] The proposed network consists of one 7.2-meter transmit-and-receive hub fixed earth station, located in Cohoes, New York, and one million receive-only home terminals. The hub and home terminal stations will communicate with the Nimiq 1 and Nimiq 2 satellites, which operate at the 91º and 82º W.L. orbit locations, respectively.[11] The home terminals will be equipped with 0.46 meter antennas to enable them to communicate with both Nimiq satellites. WSNet proposes to operate the network as follows: (1) the hub earth station will uplink video transmissions to the Nimiq satellites in the 17.3-17.8 GHz frequency band, and (2) the Nimiq satellites will provide video services to the home terminals in the 12.2-12.7 GHz band.

5. The commenters raise several issues.[12] Home Box Office ("HBO") is concerned that if the Commission were to grant the WSNet Applications, a "common conditional access system" for separate U.S. and Canadian DBS services delivered by the same satellite would facilitate subscribers from one country receiving unauthorized services from another country.[13] To prevent such a consequence, HBO urges that the U.S. and Canadian DBS services should have "separate and technically incompatible conditional access technologies."[14] DIRECTV, Inc. urges the Commission to "ensure that there will be no interference with the operations of existing U.S. DBS providers" and asks that WSNet submit for the record more technical details surrounding its proposed service.[15] The Motion Picture Association of America ("MPAA") believes that the Commission should apply the effective competitive opportunities

[8] *See* WSNet Holdings, Inc., Opposition to Petition to Deny of SES Americom, Inc. at 2 ("WSNet Opposition"). Although WSNet indicated in its Opposition that it would amend its applications to request authority for additional Internet services, it subsequently notified the Commission that such amendments would not be forthcoming. *See* WSNet Opposition at 1, 3-4 and Letter from James U. Troup and Adrian B. Copiz, Counsel for WSNet Holdings, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, May 12, 2003.

[9] *See* WSNet Applications Amendments, File Nos. SES-AMD-20030917-01295 (Sept. 4, 2003) and File No. SES-AMD-20030917-01296 (Sept. 4, 2003) ("Pegasus Amendments") and Satellite Communications Services re: Satellite Radio Applications Accepted for Filing, *Public Notice*, Report No. SES-00535, rel. Sept. 24, 2003. Pegasus, through its affiliate and subsidiary companies, owns or programs 11 broadcast television stations and resells DIRECTV DBS service to primarily rural markets. Affiliates of Pegasus currently provide direct broadcast satellite services, via the DIRECTV platform, to approximately 1.2 million rural households in 41 states. As of June 2003, there were 20.4 million DBS households and 94.1 million multichannel video programming distribution (MVPD) households. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, FCC 04-5, rel. Jan. 28, 2004 (paras 7-8). For the remainder of this Order, we refer to "WSNet" and "Pegasus" interchangeably in reference to the preparer and owner of the WSNet Applications.

[10] *See* Pegasus Amendments at Exhibit C.

[11] Nimiq 1 is now operating at 91º W.L. Nimiq 2, identified by WSNet as "the space station under construction that will be located at 82.0 degrees W.L.," (WSNet Application, Exhibit 2 at 1-2), was since launched December 29, 2002. *See* Press Release, Telesat Launches New Direct Broadcast Satellite, Dec. 30, 2002, <http://www.telesat.ca/eng/02-14.htm>. The 91° W.L. and 82° W.L. orbit locations are assigned to Canada for Broadcasting-Satellite Service (BSS) in portions of the Ku band (11 GHz-18GHz) under the International Telecommunication Union (ITU) 1983 Region 2 BSS Band Plan. Canada requested and received approval from the ITU to modify the Region 2 BSS Band Plan for the 91º W.L. and 82º W.L. orbital locations to expand the Nimiq satellites' coverage areas into the United States.

[12] The Commission also received correspondence from various members of Congress, which has been included in the record.

[13] Late filed/*Ex parte* Comments of Home Box Office ("HBO") at 1 (filed March 18, 2003).

[14] HBO comments at 1.

[15] Comments of DIRECTV, Inc. at 1-2. (filed March 8, 2002).

("ECO-Sat") test to WSNet's application, and also recommends that the Commission and Executive Branch enter negotiations with Canada to improve access to Canadian markets for U.S. content providers.[16] SES Americom, Inc. filed a petition to deny, arguing that Canada cannot meet the Commission's effective competitive opportunities test.[17] The Executive Branch agencies did not comment on the WSNet proposals or any comments filed in response to those proposals. The Commission received no comments in response to the Pegasus Amendments.

III. DISCUSSION

A. Procedural Issues

6. WSNet requests that the Commission dismiss the SES Petition because SES Americom lacks standing, or in the alternative dismiss the petition as an improperly filed informal objection.[18] We reject both requests and instead dismiss the SES Petition on the merits. The substance of this petition pertains to the ECO-Sat test and SES Americom's argument that "WSNet has not proved that U.S.-licensed satellites have 'effective competitive opportunities' in Canada to provide DBS services."[19] Regardless of whether SES Americom has standing, we would apply the ECO-Sat test in our evaluation of the WSNet Applications.[20] In light of our consideration of these issues independent of the SES Petition, we need not address the standing argument, or any other procedural arguments, that WSNet raises. Moreover, the allegations raised by WSNet regarding SES Americom's motivations in filing its Petition[21] are not relevant to our analysis, and therefore we do not address them.

B. Space Station Analysis

1. General Framework

7. In *DISCO II*, the Commission set forth the public interest analysis applicable in evaluating applications to use non-U.S. licensed space stations to provide satellite service in the United States. This analysis considers the effect on competition in the United States,[22] spectrum availability,[23] eligibility and operating (*e.g.*, technical) requirements,[24] and any national security, law enforcement, foreign policy, and trade concerns.[25] We evaluate WSNet's request under this framework.

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[16] Comments of Motion Picture Association of America ("MPAA") at 2-8 (filed March 8, 2002). The ECO-Sat test is described in more detail in para. 8 below.

[17] In re Applications of WSNet Holdings, Inc., For Authority to Operate Earth Stations to Receive from Canadian DBS Satellites, Petition to Deny of SES Americom, Inc., filed March 8, 2002 ("SES Petition").

[18] Opposition of WSNet Holdings, Inc. to Petition to Deny of SES Americom, Inc., filed March 18, 2002 ("WSNet Opposition").

[19] SES Petition at 7.

[20] *See* discussion *infra* at paras. 8-15. However, as discussed below, the ECO-Sat test is but one of several public interest factors we consider in our decision to grant the WSNet Applications.

[21] *See* WSNet Opposition at 6-9.

[22] *DISCO II*, 12 FCC Rcd at 24107-56 (paras. 30-145).

[23] *DISCO II*, 12 FCC Rcd at 24157-59 (paras. 146-50).

[24] *DISCO II*, 12 FCC Rcd at 24159-69 (paras. 151-74).

[25] *DISCO II*, 12 FCC Rcd at 24169-72 (paras. 175-82).

2. Competition Concerns

8. In *DISCO II*, the Commission established a rebuttable presumption in favor of entry by non-U.S. satellites licensed by World Trade Organization ("WTO") Members to provide services covered by the U.S. commitments under the WTO Agreement on Basic Telecommunications Services ("WTO Basic Telecom Agreement").[26] These commitments include fixed-satellite service, except for direct-to-home ("DTH") service.[27] The United States also did not make market access commitments for the DBS service.[28] In *DISCO II*, the Commission indicated that it would apply the effective competitive opportunities test ("ECO-Sat") to requests involving provision of non-WTO covered services such as DTH and DBS by non-U.S. satellites to ensure that entry by the foreign satellite does not distort competition in the U.S. market.[29] Under this test, we examine effective competitive opportunities for U.S.-licensed satellites to serve the home market of the non-U.S. satellite seeking access to the United States.[30] We examine in particular *de jure* and *de facto* barriers to entry for the provision of analogous services, and whether any such barriers would cause competitive distortions in the United States.[31] We emphasize that application of the ECO-Sat test is one factor in our general public interest analysis framework, as described above.

9. The proposed subscription video service offering constitutes DBS, which we have described as the use of satellites to deliver in the 12.2-12.7 GHz band video programming directly to subscribers using relatively small receiving antennas.[32] Pegasus proposes to provide DBS service throughout the continental United States using two Canadian DBS satellites.[33] As noted above, the

[26] *DISCO II*, 12 FCC Rcd at 24112 (para. 39). The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization (the Marrakesh Agreement). 33 I.L.M. 1125 (1994). The Marrakesh Agreement includes multilateral agreements on trade in goods, services, intellectual property, and dispute settlement. The General Agreement on Trade in Services ("GATS") is Annex 1B of the Marrakesh Agreement. 33 I.L.M. 1167 (1994). The WTO Basic Telecom Agreement was incorporated into the GATS by the Fourth Protocol to the GATS (April 11, 1997), 36 I.L.M. 354 (1997) (Fourth Protocol to the GATS). Generally, GATS requires WTO Member Nations to afford most favored nation ("MFN") treatment to all other WTO Member Nations. "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country." GATS Article II, para. 1. Member nations are permitted to take "MFN exemptions," however, under certain circumstances specified in an annex to GATS. *See* GATS Annex on Article II Exemptions. The WTO Basic Telecom Agreement also contains specific commitments with respect to market access and national treatment commitments made by WTO members.

[27] *DISCO II*, 12 FCC Rcd at 24104 (para. 25). DTH satellite service is provided in bands internationally allocated to the fixed-satellite service ("FSS") using FSS satellites. The FSS rules, including those applicable to satellites providing DTH service, are in Part 25 of the rules. DBS operates in the 12.2-12.7 GHz frequency bands (space-to-earth), allocated for the Broadcasting Satellite Service ("BSS"). *See* Policies and Rules for the Direct Broadcast Satellite Service, *Report and Order*, IB Docket No. 02-10, 17 FCC Rcd 11331, 11333 (para. 3) (2002) ("*DBS Order*"); *see also* 47 C.F.R. § 25.202.

[28] The United States made no market access or national treatment commitments for DTH, DBS, and DARS, and took an exception from MFN for these issues. *DISCO II*, 12 FCC Rcd at 24104 (para. 25).

[29] *DISCO II*, 12 FCC Rcd at 24136 (para. 98).

[30] *DISCO II*, 12 FCC Rcd at 24136-7 (para. 98).

[31] *DISCO II*, 12 FCC Rcd at 24137 (para. 99); *see also* 47 C.F.R. § 25.137(a).

[32] *See, e.g.*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Notice of Inquiry*, MB Docket No. 02-145, 17 FCC Rcd 11579 at n. 31 (2002). *See also* 47 C.F.R. § 25.201.

[33] Industry Canada has licensed the Canadian satellites, Nimiq 1 and Nimiq 2, to Telesat Canada. Canada requested a modification to the ITU Region 2 Band Plan to expand the coverage area of the Nimiq satellites to include coverage of the United States. *See* n. 11 *supra*.

United States made market access commitments for fixed-satellite services under the WTO Basic Telecom Agreement, but did not make market access commitments for DTH or DBS service. Since the presumption that entry of the Nimiq satellites to the United States will further competition in the United States does not apply, we must perform an ECO-Sat analysis for Pegasus's proposed service. This requires us to examine effective competitive opportunities for U.S.-licensed satellites to provide service in Canada that is analogous to Pegasus's proposed service.[34] We examine in particular *de jure* and *de facto* barriers to entry, and whether any such barriers would cause competitive distortions in the United States.[35] WSNet acknowledged that its applications are subject to an ECO-Sat analysis.[36]

10. WSNet argues that there is "no limit on the utilization of U.S. satellite systems by Canadian companies to provide service in Canada in the same way that WSNet . . . intends to use a Canadian satellite system to provide DBS service in the United States."[37] The record, however, indicates that Canada limits the access of U.S. programmers and U.S. content to Canada's subscription video market.[38] The MPAA notes that "Canadian distribution undertakings [including DTH] must carry a majority of Canadian signals and services," and are also subject to programming content quotas.[39] SES Americom cites Annex C of Industry Canada's Policy Framework for the Provision of Fixed Satellite Services ("Annex C") as proof that Canada "prevents companies that distribute programming from using the services of U.S. satellites to distribute Canadian programming."[40] According to Annex C, an entity "should make use of Canadian satellite facilities to carry all Canadian programming services" and "under no circumstances should an undertaking use exclusively foreign satellites for the distribution of its services to Canadians."[41] Under this framework, Industry Canada likely would deny access to a U.S. satellite proposing entry to Canada[42] in a manner analogous to that proposed by WSNet for Nimiq 1 and Nimiq 2. In other words, a Canadian entity proposing to use a U.S. satellite to deliver Canadian video programming to Canadians only would likely be denied access.[43] Thus, a *de jure* barrier likely exists in Canada for any U.S. satellite seeking to offer a WSNet-analogous service.

11. Despite the existence of this barrier, we do not believe that the Nimiq satellites should be denied access to the U.S. market for WSNet's proposed service offering. In describing how the proposed and subsequently adopted ECO-Sat test would be applied in reviewing applications for earth stations to communicate with non-U.S. satellites, the Commission stated that it would "consider whether any additional countervailing public interest factors weigh in favor of a result different from the one we would reach under the ECO-Sat analysis alone."[44] When the Commission proposed using the ECO-Sat test, it

[34] *See* 47 C.F.R. § 25.137(a).

[35] *DISCO II*, 12 FCC Rcd at 24137 (para. 99).

[36] WSNet Application, Exhibit 2 at 1-2.

[37] WSNet Application, Exhibit 2 at 2.

[38] *See*, *e.g.*, MPAA comments at 3; SES Petition at 5.

[39] MPAA comments at 3-4; *see also* SES Americom Petition at 5 (citing Broadcasting Distribution Regulations, SOR/97-555, s. 6(2)).

[40] SES Petition at 5-6.

[41] *Id.*; *see also* Policy Framework for the Provision of Fixed Satellite Service, Industry Canada, RP-008, Annex C (December 1998).

[42] Just as Canada obtained approval from the ITU to modify the ITU Region 2 Band Plan to expand its coverage area (*see* n. 11 *supra*), the United States also would have to obtain approval to modify the ITU Region 2 Band Plan in order for a U.S. satellite to expand its coverage to provide service in Canada.

[43] We made the same determination in our *DBAC Order*. *See DBAC Order*, 18 FCC Rcd at 9461-62 (para. 14).

[44] *See* Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Satellites Providing Domestic and International Service in the United States, *Notice of Proposed Rulemaking*, IB Docket No. 96-111, 11 (continued....)

noted that if a law or regulation prohibited U.S. satellites from providing service in a foreign country, the Commission "would prohibit a satellite system licensed by that country from serving the U.S. market, *unless there is a compelling public interest reason to do otherwise*."[45] Among the factors that the Commission considers is the effect that the foreign entry will have on satellite service competition *in* the United States.[46]

12. We believe that permitting Pegasus to offer its proposed service will enhance, rather than distort or harm, competition in the United States for video services.[47] We find this to be true for the same reasons we granted DBAC's application to access the Nimiq satellites.[48] We note that the Executive Branch agencies did not file comments in the record for the WSNet Applications.[49] As we observed in the *DBAC Order*, competitive distortions in the U.S. market relating to Nimiq 1 and Nimiq 2 access would only be likely to result if a number of conditions were satisfied.[50] Among those conditions would be that: (1) through use of the Canadian satellites, Pegasus would have access to cost savings, subsidies or quality-enhancing assets not available to other U.S. service providers; (2) those cost savings, subsidies, or quality-enhancing assets would be sufficiently large to enable Pegasus to offer prices and quality of service that would cause some or all of the incumbent U.S. DTH/DBS providers to exit the market; (3) following exit of some or all of the domestic DTH/DBS providers, Pegasus would be able to raise the price of service to U.S. customers; and (4) entry barriers exist such that neither the incumbent U.S. DTH/DBS providers nor new U.S. DTH/DBS providers could enter the market, thereby defeating the price increase.[51] With regard to the second and third conditions, competitive distortions related to predatory pricing are a rare phenomenon, in part because there is a very high risk that such behavior will be unsuccessful.[52] While competitive distortions might also arise from cost savings or subsidies that

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FCC Rcd 18178, 18185 (para. 12) (1996) ("*DISCO II NPRM*"). *See also DISCO II Order*, 12 FCC Rcd at 24098, 24106 (paras. 7, 29). *See also* Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, *Report and Order*, 11 FCC Rcd 3873, 3896-97 (paras. 61-62) (1995) (describing the ECO test that was the precedent for the similar ECO-Sat test).

[45] *DISCO II NPRM*, 11 FCC Rcd at 18192 (para. 38) (emphasis added).

[46] *DISCO II*, 12 FCC Rcd at 24098 (para. 7).

[47] We explain in paragraph 13 why competitive distortions are not likely to result as a consequence of granting the WSNet Application. We address the competitive benefits of granting this application in paragraph 14.

[48] *DBAC Order,* 18 FCC Rcd at 9462-64 (paras. 15-18).

[49] We also note that the Executive Branch has not appealed the *DBAC Order* decision.

[50] *DBAC Order,* 18 FCC Rcd at 9462-63 (paras. 16-17).

[51] The latter two conditions are often indicative of a predatory pricing scheme. On the conditions necessary to engage in such a scheme and for it to be successful, see, for example: DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 384-394 (2d ed. 1994) and RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 123-124 (1972). *See also*: Comsat Corporation, Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation, IB Docket No. 98-60, *Report and Order*, 14 FCC Rcd 3065, paras. 32-34 (1999) and PanAmSat Corporation, Complainant, v. Comsat Corporation-Comsat World Systems, Defendant, File No. E-96-21, *Memorandum Opinion and Order*, 12 FCC Rcd 6952, paras. 16-20 (1997).

[52] *See, e.g.,* Ronald L. Koller, *The Myth of Predatory Pricing*, ANTITRUST LAW AND ECONOMICS REVIEW 3: 105-23, (1971); John E. Kwoka, Jr. *et al.*, ed., *The Antitrust Revolution* 151 (HarperCollins College Publishers, N.Y., 1994). As the Supreme Court explained in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.:

> [T]he success of such [predatory] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in excess profits. The success of any predatory scheme depends on

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could afford a firm providing DBS service using non-U.S. satellites with the ability to price below the marginal cost of other DBS providers, in this instance, competitive distortions related to cost savings or subsidies are extremely unlikely due to Pegasus's small size compared to the major market incumbents. Moreover, the record does not contain any discussion of such cost savings or their ability to create competitive distortions.

13. We find that the above conditions do not exist, and that competitive distortion in the U.S. market would not occur if Pegasus is authorized to provide the service it proposes. Whereas DBAC proposed to offer service only in the United States, Pegasus does not clearly indicate whether it intends to provide service from the United States into Canada, and we have no knowledge of whether the government of Canada is considering permitting such service.[53] However, even if Pegasus, using a Canadian satellite, were to have access to the Canadian market that is denied to other U.S. providers, such access would not, in fact, provide Pegasus with a significant cost advantage in the U.S. market. Pegasus, in this hypothetical case, would be subject to Canadian programming content quotas in serving Canadian DBS customers. According to our current understanding of Canadian law, unless the Canadian content were to comprise half of its U.S. offerings, Pegasus would not be able to provide the full U.S. package of programs to the Canadian market. Even if Pegasus could meet the quota, it would not be able to take advantage of any significant scale economies that might result from access to Canadian customers because Canada is a significantly smaller market than the United States.[54] Therefore, any such offering would not afford Pegasus with cost-savings relative to other U.S. DBS providers that would be sufficiently large as to create a competitive distortion. Further, Pegasus is small relative to the major U.S. DBS providers. Allegations of competitive distortions related to predatory pricing, cost savings or subsidies almost always involve a major incumbent. To create a competitive distortion in DBS services, Pegasus would need to overcome all the advantages that are available to other U.S. incumbents with large installed subscriber bases.

14. Most importantly, rather than creating a competitive distortion, entry by Pegasus into the U.S. market can increase competition in DBS services and in multichannel video programming distribution ("MVPD") services generally. The market for delivery of video programming to households continues to be highly concentrated in many local markets.[55] Future provision of DBS services in these markets as proposed by Pegasus, with Canadian satellites, will not create a competitive distortion, and could increase competition in MVPD services. [56]

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> maintaining monopoly power for long enough both to recoup the predators' losses and to harvest some additional gain….For this reason, there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.

Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (citing Robert Bork, *The Antitrust Paradox*, 149-155 (1978)).

[53] *DBAC Order* 18 FCC Rcd at 9463 (para. 17). Although WSNet does not state explicitly that it intends to serve only U.S. customers, it notes that "all communications will originate and terminate in the United States." WSNet Applications, Exhibit 2 at 3.

[54] According to U.S. and Canadian census data, in 2003, the U.S. had a population of approximately of 290.8 million, while Canada had a population of approximately 31.6 million. *See* <http://eire.census.gov/popest/data/states/tables/NST-EST2003-01.php> and <http:// www.statcan.ca/english/Pgdb/demo02.htm> (visited on Feb. 18, 2004).

[55] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Tenth Annual Report*, FCC04-5, rel. Jan. 28, 2004 (para. 124).

[56] We note that as a DBS provider in the United States, Pegasus is subject to the provisions of the Satellite Home Viewer Improvement Act, enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act (continued....)

15. Although we determine that granting Pegasus authority to access the Canadian satellites will not distort, and would likely increase, competition in the United States, we still find it necessary to condition Pegasus's access to ensure that competitive distortions do not result in the future. Specifically, we will limit the scope of this authorization in this regard: we will not permit Pegasus to provide DBS programming to U.S. customers that it obtains through exclusive agreements entered into with Canadian space station operators, program suppliers, and/or program distributors. The Commission prohibits exclusive service arrangements made by both U.S. and non-U.S. satellite operators providing any services in the United States.[57] In the *DISCO II Order*, the Commission explained that prohibiting exclusive arrangements "is consistent with our national treatment and MFN obligations under the GATS because we will be treating non-U.S. satellites the same as U.S. satellites, and will treat all non-U.S. satellites similarly."[58] As noted above, a competitive distortion might exist if, because of its use of a Canadian satellite, Pegasus had access to quality-enhancing assets not available to other U.S. DTH/DBS providers, enabling Pegasus to provide a higher quality product for any given price than might be possible absent such an exclusive license. If Pegasus were to have access to Canadian content not available to other DTH/DBS providers, exclusive access to that content might provide Pegasus with an advantage that could create a competitive distortion, *i.e.*, if that content proves so popular that it places other DTH/DBS providers at a significant competitive disadvantage. While such a competitive distortion is unlikely, by imposing on Pegasus a prohibition against exclusive agreements, we eliminate the possibility that WSNet will have access to a cost-saving or quality-enhancing opportunity that is not also available to U.S. providers using U.S. satellites only. Conditioning Pegasus's authority in this manner is consistent with our action in the *DBAC Order*.[59]

3. Spectrum Availability

16. In *DISCO II*, the Commission determined that, given the scarcity of orbit and spectrum resources, it would consider spectrum availability as a factor in determining whether to allow a foreign satellite to serve the United States.[60] This is consistent with the Chairman's Note to the WTO Basic Telecom Agreement, which states that WTO Members may exercise their domestic spectrum/frequency management policies when considering foreign entry.[61]

17. DirecTV suggests that WSNet's operations could interfere with its existing DBS operations and states that the Commission must ensure that the Nimiq satellites do not interfere with the operations of existing U.S. DBS providers.[62] We conclude that the Nimiq satellites will not interfere with

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of 1999 ("IPACORA") (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. L. No. 106-113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

[57] *DISCO II*, 12 FCC Rcd at 24166 (paras. 161-67).

[58] *DISCO II*, 12 FCC Rcd at 24166 (para. 167).

[59] *See DBAC Order,* 18 FCC Rcd at 9464 (para. 19).

[60] *DISCO II*, 12 FCC Rcd at 24159 (para. 150). WSNet argues that the Commission should permit U.S. companies to use spectrum "lying fallow, even if it is being administered by another country," if such use will benefit U.S. consumers. WSNet Application, Exhibit 2 at 6. We do not address this fallow spectrum issue since we have already concluded that permitting WSNet's entry into the DBS market can increase competition and benefit consumers. *See* para. 14, *supra*.

[61] *See* Chairman of the World Trade Organization Group on Basic Telecommunications, Chairman's Note, Market Access Limitations on Spectrum Availability, 36 I.L.M. at 372 ("Chairman's Note to the WTO Basic Telecom Agreement").

[62] DirecTV comments at 1-2.

U.S. DBS operations provided that their operating parameters conform with those set forth in the plan Canada filed with the ITU for the Nimiq 1 and Nimiq 2 satellites.[63] Operations on both Nimiq satellites now fall within the parameters defined by the ITU in Appendices 30 and 30A of the International Radio Regulations as not affecting U.S. DBS satellites.[64] In this context, "not affecting" is equivalent to not interfering unacceptably. Consequently, the Nimiq 1 and Nimiq 2 satellites do not present any unacceptable increased interference potential to U.S. DBS satellites, and the Canadian administrator need not seek our agreement prior to operating these satellites or seeking notification and entry in the master register at the ITU. We therefore find that allowing Nimiq 1 and Nimiq 2 to serve the U.S. market from 91º W.L. and 82° W.L. in a manner consistent with Appendices 30 and 30A of the International Radio Regulations will neither affect the operations of any U.S.-licensed DBS satellites nor contravene the Commission's spectrum/frequency management policies.

4. Eligibility Requirements

a. Legal Qualifications

18. The Commission's *DISCO II Order* requires that space station operators not licensed by the Commission meet the same legal, financial, and technical qualifications required of U.S.-licensed space station operators. WSNet indicates in its application that Canada has granted licenses to Telesat Canada to operate Nimiq 1 and Nimiq 2.[65] We have previously reviewed letters of intent from Telesat Canada for other fixed-satellite facilities and have found that Telesat Canada is legally qualified to provide satellite services in the United States.[66] Furthermore, nothing in the record raises concerns about Telesat's legal qualifications to provide satellite services in the United States. Thus, we find that Telesat Canada is legally qualified to provide satellite service in the United States.

b. Financial Qualifications

19. In the *First Space Station Reform Order*, the Commission exempted in-orbit, non-U.S. space station systems from the bond posting requirement, reasoning that a non-U.S. licensed satellite operator with an in-orbit satellite is not likely to be a speculator or planning to warehouse spectrum.[67] WSNet indicates that Nimiq 1 has been launched and is currently operating in the 91º W.L. orbital position.[68] Consequently, we need not require a bond with regard to the Nimiq 1 satellite.

20. At the time WSNet filed its application, the Nimiq 2 satellite was under construction.[69] Thus, ordinarily, WSNet would need to post the bond required by our rules. However, our research shows that Nimiq 2 was successfully launched from Kazakhstan on December 29, 2002, [70] and WSNet

[63] *See* n. 11 *supra*.

[64] *See* International Radio Regulations, Appendices 30 and 30A.

[65] WSNet Application, Exhibit 2 at 6-7.

[66] *See* Telesat Canada, Request for Declaratory Ruling or Petition for Waiver on Earth Stations' Use of Anik E1 and Anik E2 Satellite Capacity to Provide Basic Telecommunications Service in the United States, *Order*, 15 FCC Rcd 3649, 3653 (para. 13) (Int'l Bur. 1999) ("*Anik E2 Order*"); Telesat Canada, Petition for Declaratory Ruling For Inclusion of Anik F1 on the Permitted Space Station List, *Order*, 15 FCC Rcd 24828, 24831 (para. 10) (Int'l Bur. 2002) ("*Anik F1 Order*").

[67] *First Space Station Reform Order,* 18 FCC Rcd at 10875 (para. 309).

[68] WSNet Application, Exhibit 2 at 6.

[69] WSNet Application, Exhibit 2 at 7.

informed the Commission by letter that the Nimiq 2 satellite is operating at the 82° W.L. location.[71] Consequently, we need not require a bond with regard to the Nimiq 2 satellite.

c. Operational Qualifications

21. In *DISCO II*, the Commission stated it would require non-U.S.-licensed space stations to meet the same technical requirements that apply to U.S. space stations.[72] For DBS satellites, such as Nimiq 1 and Nimiq 2, the most significant requirement is that the satellites' DBS operations must be in accordance with the sharing criteria and technical characteristics contained in Appendices 30 and 30A of the International Radio Regulations.[73] In the *DBAC Order*, the Bureau determined that Nimiq 1 and Nimiq 2 would meet applicable ITU and Commission requirements if they were to be licensed by the United States.[74] We see no need to revisit that conclusion here.

5. Other Issues

22. As described above, under *DISCO II*, the Commission includes national security, law enforcement, foreign policy, and trade concerns in its public interest analysis, and we accord deference to the expertise of the Executive Branch in this regard. The MPAA advocates that the United States Government should enter negotiations with Canada for a bilateral agreement to improve Canadian access for U.S. service and content providers.[75] We believe that this argument might have merit if the U.S. Trade Representative ("U.S.T.R.") supported it; however, the U.S.T.R. did not comment in this proceeding. Similarly, we note that no Executive Branch agency raised concerns with respect to grant of the WSNet Applications. Moreover, the issue of whether the United States should enter bilateral agreement negotiations with Canada is beyond the scope of the Bureau's review of the WSNet Applications.

23. HBO expressed concern that U.S. and Canadian DBS providers sharing a common platform for delivery of service (*i.e.*, the Nimiq satellites) could facilitate the ability of subscribers in each country to receive services to which they may not be entitled.[76] HBO maintains that in order to prevent this (and thereby minimize opportunities for a black or grey market in reception equipment), "there should be separate and technically incompatible conditional access technologies for each of the Canadian and U.S. DBS services."[77] This is an issue related to criminal and civil law enforcement and thus is beyond the scope of our review of the WSNet Applications.[78]

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[70] *See* Press Releases, Telesat Launches New Direct Broadcast Satellite, Dec. 30, 2002, <http:// www.telesat.ca/eng/02-14.htm>; Nimiq 2 Satellite Anomaly, Feb. 20, 2003, <http://www.telesat.ca/eng/03-04.htm>; Telesat Clears Nimiq 2 Satellite for Long-Term Service, April 11, 2003, <http: //www.telesat.ca/eng/03-07.htm>.

[71] *See* Letter from James U. Troup and Adrian B. Copiz, Counsel for WSNet Holdings, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, July 21, 2003.

[72] *DISCO II Order*, 12 FCC Rcd at 24161-2 (para. 156).

[73] *See* 47 C.F.R. § 25.148(f). The Commission's two-degree orbital spacing requirements do not apply to DBS satellites since the assignment plan of Appendices 30 and 30A of the ITU International Radio Regulations is based on satellite spacings of nine degrees for co-frequency, co-coverage operation.

[74] *DBAC Order*, 18 FCC Rcd at 9466-67 (paras. 26-27).

[75] MPAA comments at 6.

[76] HBO comments at 1.

[77] HBO comments at 1.

[78] *See* 47 U.S.C.A. § 605.

C. Earth Station Applications.

24. We now turn to the Pegasus earth station applications. Pegasus seeks to operate a new very small aperture terminal ("VSAT") network, which includes one transmit-and-receive fixed hub earth station in Cohoes, New York, using a 7.2-meter antenna to communicate with the Nimiq 1 and Nimiq 2 satellites. Pegasus plans to provide subscription video programming to consumer earth stations located throughout the continental United States.[79] These home terminals will consist of up to 1,000,000 Channel Master Receive-Only 0.46 meter antennas.

25. In its application, Pegasus claims that its proposed hub earth station, a Vertex 7.2 KPK 7.2 meter antenna, complies with the antenna gain patterns specified in Sections 25.209(a) and (b) of the Commission's rules.[80] The equivalent isotropically radiated power ("E.I.R.P.") of emissions of concern is a function of the antenna gain and the power supplied, which, for DBS operations, absent a technical showing and request to the ITU, is limited, pursuant to Section 25.148 of the Commission's rules, to 87.4 dBW in the DBS feeder link band as specified in Appendix 30A of the ITU's Radio Regulations.[81] Pegasus's application lists a value of 89.0 dBW for operation, but does not contain a technical showing providing justification for an E.I.R.P. level above the 87.4 dBW level specified by the ITU. Consequently, in licensing Pegasus's operation, we limit the authorized power to 87.4 dBW.

IV. CONCLUSION

26. We have performed a *DISCO II* analysis in this Order, and have determined that Pegasus's communications with the Nimiq 1 and Nimiq 2 satellites will be consistent with the Commission's policies regarding U.S. access to space stations licensed by foreign administrations. We therefore grant Pegasus's earth station applications subject to the conditions set forth in this Order, finding such grant to be in the public interest.

27. We remind Pegasus that grant of the WSNet Applications does not guarantee successful deployment of the proposed DBS system. Telesat Canada, the entity holding the Canadian license to operate the Nimiq 1 and Nimiq 2 satellites, indicated in a separate proceeding that it has sold all capacity on the Nimiq 1 and Nimiq 2 satellites to Bell ExpressVu, a Canadian DTH service provider, and that Bell ExpressVu "needs all capacity available at the 82° and 91° W.L." orbital locations.[82] Asked by the Bureau to confirm whether it will have access to the Nimiq satellites for the proposed DBS service, Pegasus indicated that as of January 30, 2004, it did not have any such arrangements with Telesat or Bell ExpressVu.[83] We note that Pegasus is required to complete construction of its hub earth station and commence operation of its network within 12 months of the date of this grant, pursuant to Section 25.133

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[79] WSNet Application (File No. SES-LIC-20020111-00075), Form 312, Items B1, B3.

[80] WSNet Application (File No. SES-LIC-20011121-02186), Form 312, Item B8.

[81] *See* 47 C.F.R. §25.148(f). DBS operations must be in accordance with the sharing criteria and technical characteristics contained in Appendices 30 and 30A of the ITU's Radio Regulations. Operation of systems using differing technical characteristics may be permitted, with adequate technical showing, and if a request has been made to the ITU to modify the appropriate Plans to include the system's technical parameters.

[82] *See* Telesat Canada, Opposition of Telesat Canada re: SAT-STA 20030903-00300, filed Nov. 12, 2003 at 3. *See also* File No. SAT-STA-20030903-00300, Request for Special Temporary Authority to Relocate DIRECTV 3 to 82° W.L. and to Conduct Telemetry, Tracking, and Command ("TT&C") Operations for an Interim Period, Filed Sept. 3, 2003. This request seeks authority to move the DIRECTV 3 satellite to Nimiq 2's orbital location, 82° W.L.

[83] *See* Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau to Scott Blank, Pegasus Development Corporation, dated January 14, 2004 and letter from Bruce D. Jacobs and Tony Lin, Counsel for Pegasus Development Corporation, to Thomas S. Tycz, Chief, Satellite Division, International Bureau, dated January 30, 2004.

of the Commission's rules.[84]

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to Sections 303(r), 308, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 303(r), 308, 309, 310, and Sections 25.121(a) and 25.137 of the Commission's rules, 47 C.F.R. §§ 25.121(a), 25.137, the Applications for Earth Station Authorizations, File Nos. SES-LIC-20011121-02186 and SES-LIC-20020111-00075, ARE GRANTED and Pegasus's VSAT network IS GRANTED authority to provide Direct Broadcast Satellite service to, from, or within the United States, by accessing the Nimiq 1 satellite located at the 91º W.L. orbital location, the Nimiq 2 satellite located at the 82º W.L. orbital location, subject to the conditions set forth in each earth station license and the following conditions:

a. Pegasus is not authorized to provide programming to U.S. customers that it obtains through exclusive agreements entered into with Canadian space station operators, program suppliers, and/or program distributors.

b. Communications between U.S. earth stations and the Nimiq 1 and Nimiq 2 DBS satellites shall be in compliance with the satellite coordination agreements reached between Canada and other administrations and in a manner consistent with Appendices 30 and 30A of the International Radio Regulations of the International Telecommunication Union.

c. Pegasus's DBS and DTH operations must comply with all rules applicable to other Commission DBS/DTH licensees (*e.g.*, the public interest obligations of 47 C.F.R. § 25.701).

d. The equivalent isotropically radiated power (E.I.R.P.) of Pegasus's hub earth station in Cohoes, New York is limited to 87.4 dBW.

e. Pegasus must complete construction of its hub earth station and commence operation of its network within 12 months of the date of this Order in accordance with 47 C.F.R. § 25.133(a). Pegasus must file timely certifications of construction in accordance with 47 C.F.R. § 25.133(b).

29. IT IS FURTHER ORDERED that this Order is issued pursuant to Section 0.261 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.261. This Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106 and 1.115, may be filed within 30 days of the date of the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau

[84] *See* 47 C.F.R. § 25.133(a).